SUPREME COURT, U. S.

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No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM E. THORSEN III, PETITIONER

v.

THE HONORABLE WILLIAM GOODWIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
HERBERT HANDMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In 1959, petitioner entered a plea of guilty in the State of Maine to a charge of larceny of property valued in excess of $100 and was sentenced to two years' probation. The term of probation was successfully completed, and petitioner thereafter settled in California. In June 1967, an indictment was returned in the United States District Court for the Northern District of California, charging petitioner with possessing unregistered firearms, in violation of 26 U.S.C. 5851, and transporting firearms in interstate commerce, having been previously convicted of a crime punishable by imprisonment for more than one year, in violation of 15 U.S.C. 902(e). The indictment

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was withdrawn after this Court's decision in *Haynes* v. *United States,* 390 U.S. 85, and on March 6, 1968, a new indictment was returned, limited to ten counts charging violations of 15 U.S.C. 902(e).

Following the first indictment, petitioner initiated a series of collateral attacks on the validity of his State conviction, contending that a recent investigation gave him reason to believe that the value of the property stolen did not exceed $100, and his offense was therefore only a misdemeanor, subject to a maximum sentence of six months' imprisonment. On October 29, 1967, he filed a petition in the Superior Court of Maine seeking a writ in the nature of *coram nobis.* Without considering the merits of the claim, that court denied the petition on the ground that a 1963 statute abolished the writ of *coram nobis* and the relief it comprehended. The court further observed that since petitioner was neither incarcerated nor on probation at the time he applied for relief, he was not entitled to a writ of habeas corpus, the only available post-conviction remedy under Maine law (Pet. App. E). The Supreme Judicial Court of Maine affirmed that decision on March 18, 1968 (Pet. App. F). A petition for a writ of certiorari to review that decision has been filed (No. 203, this Term).

Two weeks after the decision of the Supreme Judicial Court of Maine, petitioner applied for a writ of habeas corpus, attacking his 1959 State conviction, in the United States District Court for the District of Maine. On April 11, 1968, the application was denied for lack of jurisdiction because petitioner was "not

confined, detained or otherwise restrained of his liberty within the territorial limits of the District of Maine". (Pet. App. G). On May 13, 1968, the Court of Appeals for the First Circuit denied a request for a certificate of probable cause (Pet. App. D). Petitioner has also sought review of the First Circuit's decision by writ of certiorari (No. 348, this Term).

Prior to the entry of the First Circuit's decision, petitioner applied for a writ of habeas corpus, again challenging the validity of the Maine conviction, in the United States District Court for the Northern District of California. At a hearing held on May 7, 1968, respondent, Judge Goodwin, orally denied the application, holding, *inter alia,* that petitioner's appeal to the Court of Appeals for the First Circuit, raising the same claim, deprived the court of jurisdiction (Tr. 81, 84–85).[1]

Petitioner filed a notice of appeal from that decision, and the district judge thereafter informed the parties that he would file a written opinion. Prior to the issuance of any written order, petitioner applied for a certificate of probable cause from the Court of Appeals for the Ninth Circuit. On May 28, 1968, the court of appeals denied the application without opinion. Believing that the Ninth Circuit's decision was premised on the fact that the district court's decision, absent a written order, was not final, petitioner then withdrew his notice of appeal, and requested that the

[1] "Tr." refers to the transcript of the pretrial hearing conducted on May 7, 1968, found in volume two of the four-volume record filed with the Clerk of the Court.

district court issue a written order. At a hearing on June 10, 1968, the district court declined to consider the matter further, on the ground that the denial of a certificate of probable cause by the Ninth Circuit removed its jurisdiction to consider petitioner's claim (Pet. App. B, IV R. 18–30). Petitioner then filed in the Ninth Circuit a petition for a writ of mandamus to compel the district court to resolve the issue raised in the habeas corpus petition, or in the alternative, for a certificate of probable cause. On June 19, 1968, the court of appeals denied the petition, stating (Pet. App. A):

> The validity of the Maine conviction may relate to the question of guilt of the federal charge but it does not affect the legality of petitioner's being held to answer to the charge. Trial, and not habeas corpus, is the appropriate manner of resolving the issue of guilt of the federal crime and subordinate issues relating to elements of the crime. * * *

1. The court below correctly held that petitioner's custody in California pursuant to the federal indictment did not support his application for a writ of habeas corpus to challenge the validity of his prior State conviction. Before the indictment was returned in the Northern District of California, petitioner had made no attempt to establish the invalidity of the Maine conviction. The federal indictment was valid on its face, and petitioner does not contend that the

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* On the eve of trial, Mr. Justice Douglas stayed further proceedings in the district court pending this Court's disposition of the petition for a writ of certiorari. Pet. App. C.

district court in which the indictment was returned did not have jurisdiction. Since the district court plainly had the "power and authority" to act (*Harlan* v. *McGourin*, 218 U.S. 442, 448), the restraint imposed upon petitioner as a result of the valid indictment did not provide him with an opportunity to seek release by a writ of habeas corpus that did not challenge the court's jurisdiction. As the court of appeals held, the validity of the Maine conviction had no effect upon the legality of petitioner's being held to answer to the federal charge.

By emphasizing the differences in the rationales of the First and Ninth Circuits in disposing of his applications for habeas corpus, petitioner seeks to present the question whether federal habeas corpus is available to challenge the validity of a State conviction where the application is not filed until long after the State sentence had been satisfied. There is no need, however, to consider that question in the present case. Neither *Peyton* v. *Rowe*, 391 U.S. 54, nor *Carafas* v. *LaVallee*, 391 U.S. 234, on which petitioner relies, suggest that a State conviction is subject indefinitely to attack on federal habeas corpus. Moreover, the basis for petitioner's contention that habeas corpus is an appropriate remedy is the prejudice arising from the pendency of the present indictment and the fear of subsequent prosecutions under the Federal Firearms Act (Pet. 14). Petitioner's prior State conviction, however, is an element of the offenses charged in the federal indictment. Petitioner's contention that he was erroneously convicted of a

felony rather than a misdemeanor in the State court was properly viewed by the court below as a possible defense to that element of the federal charges. Although we do not believe that petitioner's contention constitutes a valid defense to a charge under 15 U.S.C. 902(e),[3] petitioner will have a full opportunity to present that contention at trial, and if the defense is sustained, it will remove the prejudice of which petitioner now complains. See *Burgett* v. *Texas*, 389 U.S. 109. Accordingly, the court below properly held that the assertion of petitioner's alleged defense did not oust the district court of jurisdiction to try the case, nor did it require that the merits of that defense be litigated in a collateral proceeding in advance of trial. See *Stack* v. *Boyle*, 342 U.S. 1; *Whitney* v. *Dick*, 202 U.S. 132.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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[3] See *DePugh* v. *United States*, 393 F. 2d 367 (C.A. 8), petition for a writ of certiorari pending, No. 169, this Term; *Laws* v. *United States*, 386 F. 2d 816 (C.A. 10), certiorari denied, 390 U.S. 1007; *United States* v. *Sutton*, 363 F. 2d 845 (C.A. 4), certiorari denied, 385 U.S. 1014.

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